

(iv) ~~declare or pay any dividend on the Series A Preferred Stock, Series B Preferred Stock or the Common Stock unless such dividend is paid in the form of shares of the Common Stock; or~~

(v) ~~repurchase or redeem any shares of the Common Stock or of the Series A Preferred Stock, including, without limitation, repurchases made from Clayton A. Thomas, Jr., Bruce W. Bednarski, Mark Mendes, Peter B. Callowhill and Corlyn A. Marsan, but other than repurchases made from other employees or consultants in connection with their termination of employment or consulting services, as the case may be, or in accordance with the terms of the Corporation's Right of First Refusal as set forth in the Amended and Restated Investor Rights Agreement between the Corporation, the holders of the Preferred Stock and certain holders of Common Stock, dated May 18, 1998.~~

(f) ~~The Corporation shall not, without the written consent or affirmative vote of the holders of a majority the then outstanding shares of Series A Preferred Stock, given in writing or by vote at a meeting, consenting or voting (as the case may be) together as a class:~~

(i) ~~prior to December 31, 2000, engage in an Acquisition Event, unless the value of the Corporation based on such transaction is equal to or exceeds \$30,000,000 and the proceeds received by the Corporation are in Cash or securities publicly traded on a recognized United States securities exchange;~~

(ii) ~~authorize, create or issue any shares of stock, or securities exchangeable for, convertible into or evidencing the right to purchase any shares of stock, having rights, preferences or privileges (including without limitation, redemption rights or rights of anti-dilution protection) superior to or on a parity with that of the Series A Preferred Stock, including, without limitation, authorization or issuance of additional shares of Series A Preferred Stock;~~

(iii) ~~amend, alter, or repeal the Corporation's Bylaws (including, without limitation, Article 2 thereof) or this Certificate of Incorporation so as to materially affect the preferences, special rights or other powers of the Series A Preferred Stock;~~

(iv) ~~declare or pay any dividend on the Series A Preferred Stock, Series B Preferred Stock or the Common Stock unless such dividend is paid in the form of shares of the Common Stock; or~~

(v) ~~repurchase or redeem any shares of the Common Stock or of the Series A Preferred Stock, including, without limitation, repurchases made from Clayton A. Thomas, Jr., Bruce W. Bednarski, Peter B. Callowhill and Corlyn A. Marsan, but other than repurchases made from other employees or consultants in connection with their termination of employment or consulting services, as the case may be, or in accordance with the terms of the Corporation's Right of First Refusal as set forth in the Amended and Restated Investor Rights Agreement~~

between the Corporation, the holders of the Preferred Stock and certain holders of Common Stock, dated May 18, 1998.

(g) The Corporation shall not, without the consent or affirmative vote of a majority of the Board of Directors, given in writing or by vote at a m&g:

(i) incur senior and subordinated indebtedness that in the aggregate exceeds tie greater of (x) four times the Corporation's earnings before interest, taxes, depreciation and amortization and (y) \$30,000,000; or

(ii) make capital expenditures that exceed \$15,000,000 per annum.

4. **Optional Conversion.** The holders of the Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) **Right to Convert.** Each share of Preferred Stock shall be convertible, at the option of the holder thereof, at any time and from time to time, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the applicable Original Purchase Price (as defined below) by the Conversion Price (as defined below) in effect at the time of conversion. The Original Purchase Price of the Series A Preferred Stock shall be \$3.425. The Original Purchase Price of the Series B Preferred Stock shall be \$3.085. The conversion price at which shares of Common Stock shall be deliverable upon conversion of the Preferred Stock without the payment of additional consideration by the holder thereof (the "Conversion Price") shall initially be \$3.425 for the Series A Preferred Stock and \$3.085 for the Series B Preferred Stock. Each initial Conversion Price, and the rate at which shares of Preferred Stock may be converted into shares of Common Stock, shall be subject to adjustment as provided below.

In the event of a notice of redemption of any shares of Preferred Stock pursuant to Section 6 hereof, the Conversion Rights of the shares designated for redemption shall terminate at the close of business on the fifth full day preceding the date fixed for redemption, unless the redemption price is not paid when due, in which case the Conversion Rights for such shares shall continue until such price is paid in full. In the event of a liquidation of the Corporation, the Conversion Rights shall terminate at the close of business on the first full day preceding the date fixed for the payment of any amounts distributable on liquidation to the holders of Preferred Stock.

(b) **Fractional Shares.** No fractional shares of Common Stock shall be issued upon conversion of the Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the then effective applicable Conversion Price.

(c) **Mechanics of Conversion.**

(i) In order for a holder of Preferred Stock to convert shares of Preferred Stock into shares of Common Stock such holder shall surrender the certificate or certificates for such shares of Preferred Stock at the office of the transfer agent for the Preferred Stock (or at the principal office of the Corporation if the Corporation serves as its own transfer agent), together with written notice that such holder elects to convert all or any number of the shares of the Preferred Stock represented by such certificate or certificates. Such notice shall state such holder's name or the names of the nominees in which such holder wishes the certificate or certificates for shares of Common Stock to be issued. If required by the Corporation, certificates surrendered for conversion shall be endorsed or accompanied by a written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or his or its attorney duly authorized in writing. The date of receipt of such certificates and notice by the transfer agent (or by the Corporation if the Corporation serves as its own transfer agent) shall be the conversion date ("Conversion Date"). The Corporation shall, as soon as practicable after the Conversion Date, issue and deliver at such office to such holder of Preferred Stock, or to his or its nominees, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled; together with cash in lieu of any fraction of a share.

(ii) The Corporation shall at all times when the Preferred Stock shall be outstanding, reserve and keep available out of its authorized but unissued stock, for the purpose of effecting the conversion of Preferred Stock, such number of its duly authorized shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of Preferred Stock. Before taking any action which would cause an adjustment reducing the Conversion Price below the then par value of the shares of Common Stock issuable upon conversion of Preferred Stock, the Corporation will take any corporate action which may, in the opinion of its counsel, be necessary in order that the Corporation may validly and legally issue fully paid and nonassessable shares of Common Stock at such adjusted Conversion Price..

(iii) Upon any such conversion, no adjustment to the applicable Conversion Price shall be made for any accrued and unpaid dividends on Preferred Stock surrendered for conversion provided that all accrued and unpaid dividends shall remain payable pursuant to the term.5 of Section 1 above.

(iv) All shares of Preferred Stock which shall have been surrendered for conversion as herein provided shall no longer be deemed to be outstanding and all rights with respect to such shares, including the rights, if any, to receive notices and to vote, shall immediately cease and terminate on the Conversion Date, except only the right of the holders thereof to receive shares of Common Stock in exchange therefor and payment of any accrued and unpaid dividends on the shares of Preferred Stock exchanged. Any shares of Preferred Stock so converted shall be retired and canceled and shall not be reissued, and the Corporation may from time to time take such appropriate action as may be necessary to reduce the authorized Preferred Stock accordingly.

**(d) ~~Adjustments to Conversion Price for Diluting Issues:~~**

**(i) ~~Special Definitions.~~** For purposes of this Subsection 4(d), the following definitions shall apply:

**(A) "Option"** shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock or Convertible Securities, ~~excluding options granted to employees or consultants of the Corporation pursuant to an option plan or other arrangements adopted by the Board of Directors, to acquire up to a maximum of 2,411,698 shares of Common Stock, such number of shares giving effect to the Stock Split, as outstanding on the date hereof (subject to appropriate adjustment for any stock dividend, stock split, combination or other similar recapitalization affecting such shares).~~

**(B) "Original Issue Date"** shall mean the date on which a share of Series A Preferred Stock or Series B Preferred Stock, as applicable, was first issued.

**(C) "Convertible Securities"** shall mean any evidences of indebtedness, shares or other securities directly or indirectly convertible into or exchangeable for Common Stock.

**(D) "Additional Shares of Common Stock"** shall mean all shares of Common Stock issued (or, pursuant to Subsection 4(d)(iii) below, deemed to be issued) by the Corporation after the Series B Original Issue Date, other than shares of Common Stock issued or issuable:

**(I)** upon conversion of shares of Preferred Stock outstanding on the Series B Original Issue Date;

**(II)** as a dividend or distribution on Preferred Stock;

**(III)** by reason of a dividend, stock split, split-up Or other distribution on shares of common Stock excluded from the definition of Additional Shares of Common Stock by the foregoing clauses (I) and (II) or this clause (III); or

**(IV)** upon the exercise of the options excluded from the definition of "Option" in Subsection 4(d)(i)(A).

**(ii) ~~No Adjustment of Conversion Price.~~** No adjustment in the number of shares of Common Stock into which Preferred Stock is convertible shall be made, by adjustment in the applicable Conversion Price thereof: (a) unless the consideration per share (determined pursuant to Subsection 4(d)(v)) for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is less than the applicable Conversion Price in effect on the date of,

and immediately prior to, the issue of such Additional Shares, or (b) if prior to such issuance, the Corporation receives written notice from the holders of at least two-thirds (2/3) of the then outstanding shares of each of the Series A Preferred Stock and the Series B Preferred Stock agreeing that no such adjustment shall be made as the result of the issuance of Additional Shares of common Stock.

(iii) ~~Issue of Securities~~ ~~Delayed Issue of Additional Shares of Common Stock~~

(A) ~~Options and Convertible Securities.~~ If the Corporation at my time or from time to time after the applicable Original Issue Date shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock (as set forth in the instrument relating thereto without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that Additional Shares of Common Stock shall not be deemed to have been issued unless the consideration per share (determined pursuant to Subsection 4(d)(v) hereof) of such Additional Shares of Common Stock would be less than the applicable Conversion Price in effect on the date of and immediately prior to such issue, or such record date, as the case may be, and provided further that in any such case in which Additional Shares of Common Stock are deemed to be issued:

(I) no further adjustment in the applicable Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;

(II) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase in the consideration payable to the Corporation, or decrease in the number of shares of Common Stock issuable, upon the exercise, conversion or exchange thereof, the applicable Conversion Price computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities;

(III) no readjustment pursuant to clause (II) above shall have the effect of increasing the applicable Conversion Price to an amount which exceeds the lower of (i) the applicable Conversion Price on the original adjustment date, or (ii) the applicable Conversion Price that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date; and

(IV) upon the expiration or termination of any unexercised Option, the applicable Conversion Price shall not be readjusted, but the Additional Shares of Common Stock deemed issued as the result of the original issue of such Option shall not be deemed issued for the purposes of any subsequent adjustment of the applicable Conversion price.

(B) Stock Dividends and Subdivisions. In the event that the Corporation at any time or from time to time after the applicable Original Issue Date shall declare or pay any dividend on the Common Stock payable in Common Stock, or effect a subdivision of the outstanding shares of Common Stock (by reclassification or otherwise than by payment of a dividend in Common Stock), then Additional Shares of Common Stock shall be deemed to have been issued:

(I) in the case of any such dividend, immediately after the close of business on the record date for the determination of holders or any class of securities entitled to receive such dividend, or

(II) in the case of any subdivision, at the close of business on the date immediately prior to the date upon which such corporate action becomes effective.

If such record date shall have been fixed and such dividend shall not have been fully paid on the date fixed therefor, the adjustment previously made in the applicable Conversion Price which became effective on such record date shall be canceled as of the close of business on such record date, and thereafter the applicable Conversion Price shall be adjusted pursuant to this Subsection 4(d)(iii) as of the time of actual payment of such dividend.

(iv) Adjustment of Conversion Price Upon Issuance of Additional Shares of Common Stock.

(A) Issuance Prior to Full Ratchet Date. In the event the Corporation shall issue Additional Shares of Common Stock prior to the applicable Full Ratchet Date (as defined below) (including Additional Shares of Common Stock deemed to be issued pursuant to Subsection 4(d)(iii)), without consideration or for a consideration per share less than the applicable Conversion Price in effect on the date of and immediately prior to such issue, then and in such event, such Conversion Price shall be reduced, concurrently with such issue, to a price equal to the consideration per share for such Additional Shares of Common Stock effective as of the date of the issuance of such Additional Shares of Common Stock; provided that in the event the Corporation, without receiving any consideration, declares a dividend on Common Stock payable in Common Stock or effects a subdivision of the outstanding shares of Common Stock into a greater number of shares of Common Stock, the Conversion Price in effect immediately prior to such stock dividend or subdivision shall, on the date that Additional Shares of Common Stock are deemed issued pursuant to Subsection 4(d)(iii)(B), be decreased proportionately, and provided further, that the applicable Conversion Price shall not be so reduced at such time if the amount of such reduction would be an amount less than \$.05, but any such amount shall be

carried forward and reduction with respect thereto made at the time of and together with any subsequent reduction which, together with such amount and any other amount or amounts 60 carried forward, shall aggregate \$.05 or more. The "Full Ratchet Date" for the Series A Preferred Stock shall mean May 18, 1999. The "Full Ratchet Date" for the Series B Preferred Stock shall mean November 14, 1999.

(B) ~~Issuance to Holders of Preferred Stock Prior to Full Ratchet Date.~~ Notwithstanding anything contained in Section (A) above to the contrary, in the event the Corporation shall issue Additional Shares of Common Stock solely to any holders of the Series A Preferred Stock or the Series B Preferred Stock prior to the applicable Full Ratchet Date (including Additional Shares of Common Stock deemed to be issued pursuant to Subsection 4(d)(iii)), without consideration or for a consideration per share less than the applicable Conversion Price in effect on the date of and immediately prior to such issue, then and in such event, such Conversion Price shall be reduced, concurrently with such issue, to a price equal to the greater of (x) the consideration per share for such Additional Shares of Common Stock effective as of the date of the issuance of such Additional Shares of Common Stock or (y) the Share Fair Market Value (as defined below); provided that the applicable Conversion Price shall not be so reduced at such time if the amount of such reduction would be an amount less than \$.05, but any such amount shall be carried forward and reduction with respect thereto made at the time of and together with any subsequent reduction which, together with such amount and any other amount or amounts so carried forward, shall aggregate \$.05 or more. The "Share Fair Market Value" shall mean the fair market value of share of Common Stock on the date of and immediately prior to such issue to be determined by disinterested appraisal firm which is a member of a recognized professional association reasonably acceptable to the Corporation and the holders of a majority of the Preferred Stock. If the parties are unable to agree on an appraisal firm within 10 days after the issue of stock, a firm shall be selected by lot from the top-tier investment banking firms, after the Corporation and the holders of the Preferred Stock have each eliminated one such firm. The selected appraisal firm shall then make a determination of the Share Fair Market Value. The selection and determination of the appraisal firm shall be final and binding upon all parties. The expenses of the appraisal firm shall be borne by the Corporation.

(C) ~~Issuance After Full Ratchet Date.~~ In the event the Corporation shall issue Additional Shares of Common Stock on or after the applicable Full Ratchet Date (including Additional Shares of Common Stock deemed to be issued pursuant to Subsection 4(d)(iii)), without consideration or for a Consideration per share less than the applicable Conversion Price in effect on the date of and immediately prior to such issue, then and in such event, such Conversion Price shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) determined by multiplying such Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Common Stock which the aggregate consideration received by the Corporation for the total number of Additional Shares of Common Stock so issued would purchase at such Conversion Price; and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of such

Additional Shares of Common Stock so issued; provided that, for the purpose of this Subsection 4(d)(iv), all shares of Common Stock issuable upon conversion of shares of Preferred Stock or other Convertible Securities and upon exercise of options or warrants outstanding immediately prior to such issue shall be deemed to be outstanding, and immediately after any Additional Shares of Common Stock are deemed issued pursuant to Subsection 4(d)(iii) (whether or not excluded from the definition of "Additional Shares of Common Stock" by virtue of clauses (II), (III) and (IV) of Subsection 4(d)(i)(D)), such Additional Shares of Common Stock shall be deemed to be outstanding; provided further, that in the event the Corporation, without receiving any consideration, declares a dividend on Common Stock payable in Common Stock or effects a subdivision of the outstanding shares of Common Stock into a greater number of shares of Common Stock, the Conversion Price in effect immediately prior to such stock dividend or subdivision shall, on the date that Additional Shares of Common Stock are deemed issued pursuant to Subsection 4(d)(iii)(B), be decreased proportionately, and provided further, that the applicable Conversion Price shall not be so reduced at such time if the amount of such reduction would be an amount less than \$.05, but any such amount shall be carried forward and reduction with respect thereto made at the time of and together with any subsequent reduction which, together with such amount and any other amount or amounts so carried forward, shall aggregate \$.05 or more.

(v) Determination of Consideration. For purposes of this Subsection 4(d), the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

(A) Cash and Property: Such consideration shall:

(I) insofar as it consists of cash, be computed at the aggregate of cash received by the Corporation, excluding amounts paid or payable for accrued interest or accrued dividends;

(II) insofar as it consists of property other than cash, be computed at the fair market value thereof at the time of such issue, determined as of the close of business on the date of computation based on the closing price for such property on the principal market on which such property trades or, if there is no established market for such property, as determined in good faith by the Board of Directors; and

(III) in the event Additional Shares of Common Stock are issued together with other securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (I) and (II) above, as determined in good faith by the Board of Directors.

(B) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued

pursuant to Subsection 4(d)(iii)(A), relating to Options and Convertible Securities, shall be determined by dividing

(I) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities, by

(II) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(C) ~~Stock Dividends and Stock Subdivisions.~~ Any Additional Shares of Common Stock deemed to have been issued pursuant to Subsection 4(d)(iii)(B), relating to stock dividends and stock subdivisions, shall be deemed to have been issued for no consideration.

(vi) a

In the event the outstanding shares of Common Stock shall be combined or consolidated, by reclassification or otherwise, into a lesser number of shares of Common Stock, the applicable Conversion Price in effect immediately prior to such combination or consolidation shall, concurrently with the effectiveness of such combination or consolidation, be increased proportionately.

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In case of any Acquisition Event (other than an Acquisition Event which is treated as a liquidation pursuant to Subsection 2(d) or Z(e)), each share of Preferred Stock shall thereafter be convertible into the kind and amount of shares of stock or other securities or property to which a holder of the number of shares of Common Stock of the Corporation deliverable upon conversion of such Preferred Stock would have been entitled upon such Acquisition Event; and, in such case, appropriate adjustment (as determined in good faith by the Board of Directors) shall be made in the application of the provisions in this Section 4 set forth with respect to the rights and interest thereafter of the holders of Preferred Stock, to the end that the provisions set forth in this Section 4 (including provisions with respect to changes in and other adjustments of the applicable Conversion Price) shall thereafter be applicable, as nearly as

reasonably may be, in relation to any shares of stock or other property thereafter deliverable upon the conversion of the Preferred Stock.

(c) No Impairment. The Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of Preferred Stock against impairment.

(f) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of a Conversion Price pursuant to this Section 4, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Preferred Stock, furnish or cause to be furnished to such holder a similar certificate setting forth (i) such adjustments and readjustments, (ii) the applicable Conversion Price then in effect, and (iii) the number of shares of Common Stock and the amount, if any, of other property which then would be received upon the conversion of the applicable Preferred Stock.

(g) Notice of Record Date. In the event:

(i) that the Corporation declares a dividend (or any other distribution) on its Common Stock payable in Common Stock or other securities of the Corporation;

(ii) that the Corporation subdivides or combines its outstanding shares of Common Stock;

(iii) of any reclassification of the Common Stock of the Corporation (other than a subdivision or combination of its outstanding shares of Common Stock or a stock dividend or stock distribution thereon), or of any Acquisition Event; or

(iv) of the involuntary or voluntary dissolution, liquidation or winding up of the corporation;

then the Corporation shall cause to be filed at its principal office or at the office of the transfer agent of Preferred Stock, and shall cause to be mailed to the holders of Preferred Stock at their last addresses as shown on the records of the Corporation or such transfer agent, at least ten days prior to the record date specified in (A) below or twenty days before the date specified in (B) below, a notice stating

(A) the record date of ~~such dividend, distribution, subdivision or combination, or~~, if a record is not to ~~be taken~~, the date as of which ~~the holders~~ of Common Stock of record to be ~~entitled to~~ such dividend, ~~distribution~~, subdivision or ~~combination~~ are to be determined, or

(B) the ~~date on~~ which such ~~reclassification~~, consolidation, ~~merger~~, sale, dissolution, liquidation or winding up is ~~expected to become effective~~, and the date as of which it is ~~expected that holders of Common Stock~~ of record shall be ~~entitled to~~ exchange ~~their shares of Common Stock~~ for securities or ~~other property deliverable~~ upon such ~~reclassification~~, consolidation, merger, sale, dissolution or winding up.

## 5. **Mandatory Conversion.**

### (a) **Series B Preferred Stock**

(i) ~~All, and not less than all, of the shares of Series B Preferred Stock then outstanding shall be automatically converted, without any action on the part of the holder thereof, into shares of Common Stock, at the then effective applicable Conversion Price, at the closing of a public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, resulting in at least \$20,000,000 of gross proceeds to the Corporation, and at a price of at least \$ 6.17 per share of Common Stock (subject to Adjustment) (such offering, a "Qualified Public Offering").~~

(ii) ~~In addition to the mandatory conversion provisions of Section 5(a)(i) hereof, all and not less than all, of the holders of shares of Series B preferred Stock then outstanding will be required to convert their shares of Series B Preferred Stock into shares of Common Stock, at the then effective applicable Conversion Price, at any time upon Written notice received from the holders of at least m-thirds (2/3) of the then outstanding shares of Series B Preferred Stock consenting to the automatic conversion of all of the Series B Preferred Stock into shares of Common Stock pursuant to this Section 5(a)(ii).~~

### (b) **Series A Preferred Stock**

(i) ~~All, and not less than all, of the shares of Series A Preferred Stock then outstanding shall be automatically converted, without any action on the part of the holder thereof, into shares of Common Stock, at the then effective applicable Conversion Price, at the closing of a Qualified Public Offering.~~

(ii) ~~In addition to the mandatory conversion provisions of Section 5(b)(i) hereof, all and not less than all, of the holders of shares of Series A Preferred Stock then outstanding will be required to convert their shares of Series A Preferred Stock into shares of Common Stock, at the then effective applicable Conversion Price, at any time upon written notice received from the holders of at least two-thirds (2/3) of the then outstanding shares of~~

Series A Preferred Stock consenting to the automatic conversion of all of the Series A Preferred Stock into shares of Common Stock pursuant to this Section 5(b)(ii).

(c) In the case of any automatic conversion pursuant to this Section 5, the outstanding shares of Preferred Stock to be automatically converted shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent; provided, that the Corporation shall not be obligated to issue to any holder certificates evidencing the shares of Common Stock issuable such conversion unless certificates evidencing such shares of Preferred Stock are delivered either to the Corporation or any transfer agent of the Corporation.

(d) All certificates evidencing shares of Preferred Stock which are required to be surrendered for conversion, in accordance with the provisions hereof shall, from and after the date such certificates are so required to be surrendered, be deemed to have been retired and canceled and the shares of Preferred Stock represented thereby converted into Common Stock for all purposes, notwithstanding the failure of the holder or holders thereof to surrender such certificates on or prior to such date. The Corporation may thereafter take such appropriate action as may be necessary to reduce the authorized Preferred Stock accordingly.

## 6. Redemption.

### (a) Series B Redemption.

(i) If the Company has not consummated a Qualified public Offering, then at any time during the Series B Redemption Period (as defined below) the holders of Series B Preferred Stock shall have the right to require the Corporation to redeem shares of Series B Preferred Stock as described in this Section 6 at the Series B Redemption Price (as defined below) by delivering written notice to the Corporation (a "Series B Redemption Election"). The "Series B Redemption Period" shall mean the later of (x) the 30 day period commencing on the date that is, the one year anniversary of the maturity date of any high yield debt issued by the Corporation prior to December 31, 1998; or (y) March 31, 2003.

(ii) Upon the delivery of a Series B Redemption Election, the Corporation shall notify promptly all holders of shares of Series B Preferred Stock in writing (the "Series B Redemption Notice") of the delivery of the Redemption Election, and a disinterested appraisal firm which is a member of a recognized professional association reasonably acceptable to the Corporation and the holders of a majority of the Series B Preferred Stock shall determine Market Value as set forth below. If the parties are unable to agree on an appraisal firm within 10 days after the expiration of the delivery of the Series B Redemption Notice, a firm shall be selected by lot from the top-tier investment banking firms, after the Corporation and the holders of the Series B Preferred Stock have each eliminated one such firm (the "Appraisal Firm"). The Appraisal Firm shall then make a determination of the Market Value, and, using such determination of Market Value, shall calculate the Series B Redemption Price. The selection and determination of

the Appraisal Firm shall be final and binding upon all parties. The expenses of the Appraisal Firm shall be borne equally by the holders of the Series B Preferred Stock, as a group and on a pro rata basis in accordance with the shares of Series B Preferred Stock to be redeemed, and the Corporation.

(iii) The holders of shares of Series B Preferred Stock may elect to sell to the Corporation all or a portion of their shares of Series B Preferred Stock by delivering written notice to the Corporation within 15 days after final determination of the Series B Redemption Price. Subject to the provisions hereof, within 40 days after final determination of the Series B Redemption Price, the Corporation shall purchase, and all such electing holders of Series B Preferred Stock shall sell, the portion of such shares which the holders thereof have elected to sell to the Corporation at a time and place mutually agreeable to the Corporation and the holders of the Series B Preferred Stock (the "Series B Redemption Closing"). The Corporation shall notify all holders of Series B Preferred Stock of the date and place of the Series B Redemption Closing at least seven days prior to the Series B Redemption Closing.

(iv) At the Series B Redemption Closing, the holders of Series B Preferred Stock shall deliver to the Corporation certificates representing the shares of Series B Preferred Stock which they have elected to sell to the Corporation; and the Corporation shall deliver to each such holder the Series B Redemption Price for each share of Series B Preferred Stock to be sold to the Corporation by cashier's or certified check or by wire transfer to immediately available funds to an account designated by such holder.

(v) The "Series B Redemption Price" of a share of Series B Preferred Stock means the amount equal to the amount which would be received per share of Series B Preferred Stock if the assets of the Corporation were sold for cash equal to the Market Value, and the Corporation were liquidated immediately thereafter pursuant to Section 2. "Market Value" means the fair market value of the Corporation as a going concern determined on the basis of the sale of 100% of the Corporation as between a strategic buyer and a willing seller and taking into account all relevant factors determinative of value.

**(b) Series A Redemption.**

(i) If the Company has not consummated a Qualified Public Offering, then at any time following either (IL) the Series B Redemption Closing if any holders of Series B Preferred Stock shall have delivered a Series B Redemption Election to the Corporation or (y) the end of the Series B Redemption Period if no holders of Series B Preferred Stock shall have delivered a Series B Redemption Election to the Corporation, the holders of Series A Preferred Stock shall have the right to require the Corporation to redeem shares of Series A Preferred Stock as described in this Section 6 at the Series A Redemption Price (as defined below) by delivering written notice to the Corporation (a "Series A Redemption Election").

(ii) Upon the delivery of a Series A Redemption Election, the Corporation shall notify promptly all holders of shares of Series A Preferred Stock in writing (the "Series A Redemption Notice") of the delivery of the Series A Redemption Election, and a disinterested Appraisal Firm which is a member of a recognized professional association reasonably acceptable to the Corporation and the holders of a majority of the Series A Preferred Stock shall determine Market Value as set forth below. If the parties are unable to agree on an Appraisal Firm within 10 days after the expiration of the delivery of the Series A Redemption Notice, a firm shall be selected by lot from the top-tier investment banking firms, after the Corporation and the holders of the Series A Preferred Stock have each eliminated one such firm. The Appraisal Firm shall then make a determination of the Market Value, and, using such determination of Market Value, shall calculate the Series A Redemption Price. The selection and determination of the Appraisal Firm shall be final and binding upon all parties. The expenses of the Appraisal Firm shall be borne equally by the holders of the Series A Preferred Stock, as a group and on a pro rata basis in accordance with the shares of Series A Preferred Stock to be redeemed, and the Corporation.

(iii) Within 10 days after the final determination of the Series A Redemption Price pursuant to subparagraph (b) above, the holders of shares of Series A Preferred Stock may elect to sell to the Corporation all or a portion of their shares of Series A Preferred Stock by delivering written notice to the Corporation. Subject to the provisions hereof, within 40 days after the final determination of the Series A Redemption Price, the Corporation shall purchase, and all such electing holders of Series A Preferred Stock shall sell, the portion of such shares which the holders thereof have elected to sell to the Corporation at a time and place mutually agreeable to the Corporation and the holders of the Series A Preferred Stock (the "Series A Redemption Closing"). The Corporation shall notify all holders of Series A Preferred Stock of the date and place of the Series A Redemption Closing at least seven days prior to the Series A Redemption Closing.

(iv) At the Series A Redemption Closing, the holders of Series A Preferred Stock shall deliver to the Corporation certificates representing the shares of Series A Preferred Stock which they have elected to sell to the Corporation, and the Corporation shall deliver to each such holder the Series A Redemption Price for each share of Series A Preferred Stock to be sold to the Corporation by cashier's or certified check, or by wire transfer of immediately available funds to an account designated by such holder.

(v) The "Series A Redemption Price" of a share of Series A Preferred Stock means the amount equal to the amount which would be received per share of Series A Preferred Stock if the assets of the Corporation were sold for cash equal to the Market Value, and the Corporation were liquidated immediately thereafter pursuant to Section 2.

(c) Notwithstanding anything to the contrary contained in this Section 6, if the Corporation is unable to redeem in full all shares tendered for redemption because the Corporation has insufficient legal capital available to effect such redemptions, the Corporation

shall allocate its available legal capital as follows: (i) first, to payment of the aggregate Series B Redemption Price to holders of Series B Preferred Stock that have requested that the Corporation redeem their shares of Series B Preferred Stock in accordance with Section 6(a) above; and (ii) second, to payment of the aggregate Series A Redemption Price to holders of Series A Preferred Stock that have requested that the Corporation redeem their shares of Series A Preferred Stock in accordance with Section 6(b) above. Any portion payable to holders of Preferred Stock pursuant to this Section 6 that is not paid in cash or cash equivalents at the respective Redemption Closing shall be paid for by the issuance at such Redemption Closing of promissory notes in form and substance reasonably satisfactory to the holders of the Preferred Stock receiving such notes (the "Redemption Notes"). At any time that Redemption Notes are outstanding, the Corporation may incur bank debt or third-party institutional non-equity financing in connection with the operation of its business which is senior to the Redemption Notes so long as such debt does not prohibit the timely payment of amounts due on the Redemption Notes unless such senior debt is in default at such time. Notwithstanding the foregoing, the Redemption Notes shall remain senior to any obligations owed to Clayton A. Thomas, Jr., Bruce W. Bednarski, Peter B. Callowhill, Corlyn A. Marsan, or other holders of Common Stock.

The Redemption Notes will bear interest per annum at the greater of (i) Prime plus 100 basis points, or (ii) 8.0%. "Prime" means a floating rate per annum equal to the prime interest rate per annum published from time to time in the "Money Rates" section of the Wall Street Journal (and the highest such rate if more than one is so published). Accrued interest on the Redemption Notes will be payable monthly. The principal amount of the Redemption Notes will be payable in thirty-six (36) equal monthly installments beginning within 30 days of the applicable Redemption Closing as set forth above. The Redemption Notes will be prepayable at the Corporation's option at any time without penalty or premium.

**FIFTH:** Except as otherwise provided in this Certificate of Incorporation or a certificate of designation relating to the rights of the holders of any class or series of Preferred Stock, voting separately by class or series, to elect additional directors under specified circumstances, the number of directors of the Corporation shall be as fixed from time to time by or pursuant to the By-laws of the Corporation (the "By-Laws"). No director of the Corporation need be a Stockholder,

**SIXTH:** The Corporation is to have perpetual existence.

**SEVENTH:** In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized:

- (a) To make, alter or repeal By-Laws of the Corporation.
- (b) To authorize and cause to be executed mortgages and liens upon the real and personal property of the Corporation.

(c) To set apart out of any of the funds of the Corporation available for dividends a reserve or reserves for any proper purpose and to abolish any such reserve in the manner in which it was created.

(d) To designate one or more committees, each committee to consist of one or more of the directors of the Corporation, The Board may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The By-Laws may provide, that, in the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the Board of Directors, or in the By-Laws of the Corporation, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to amending the Certificate of Incorporation, adopting an agreement of merger or consolidation, recommending to the stockholders the sale, lease or exchange of all or substantially all of the Corporation's property and assets, recommending to the stockholders a dissolution of the Corporation or a revocation of a dissolution, or amending the By-Laws of the Corporation; and, unless the resolution or By-Laws expressly so provide, no such committee shall have the power of authority to declare a dividend or to authorize the issuance of stock.

(e) When and as authorized by the stockholders in accordance with statute, to sell, lease, exchange or otherwise dispose of all or substantially all of the property and assets of the Corporation, including its good will and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property including shares of stock in, and/or other securities of, any other corporation or corporations, as its Board of Directors shall deem expedient and for the best interests of the Corporation.

(f) To fix, determine and vary from time to time the amount to be maintained as surplus and the amount or amounts to be set apart as working capital.

(g) To authorize the payment of compensation to the directors for services to the Corporation, including fees for attendance at meetings of the Board of Directors, of the Executive Committee, and of other committees, and to determine the amount of such compensation and fees.

(h) To authorize the issuance from time to time of shares of its stock of any class whether now or hereafter authorized, or securities convertible into shares of its stock

of any class or classes, whether now or hereafter authorized, for such consideration as may be deemed advisable by the Board of Directors and, except as otherwise set forth in this Certificate of Incorporation, without any action by the stockholders.

**EIGHTH:** Meetings of stockholders may be held within or without the State of Delaware, as the By-Laws may provide. The books of the Corporation may be kept (subject to any provisions contained in the statutes) outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the By-Laws of the Corporation. Elections of directors need not be by written ballot unless the By-Laws of the Corporation shall so provide.

**NINTH:** A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit. If the Delaware General Corporation Law is amended after approval of this article to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

Any repeal or modification of the foregoing paragraph by the stockholders of the corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

**TENTH:** The corporation shall, to the fullest extent permitted by Section 145 of the General Corporation Law of Delaware, as amended from time to time, indemnify each person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he is or was, or has agreed to become, a director or officer of the corporation, or is or was serving, or has agreed to serve, at the request of the corporation, as a director, officer or trustee of, or in a similar capacity with, another corporation, partnership, joint venture, trust or other enterprise (including any employee benefit plan), or by reason of any action alleged to have been taken or omitted in such capacity, against all expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him or on his behalf in connection with such action, suit or proceeding and any appeal therefrom.

Indemnification may include payment by the corporation of expenses in defending an action or proceeding in advance of the final disposition of such action or proceeding upon receipt of an undertaking by the person indemnified to repay such payment if it is ultimately determined that such person is not entitled to indemnification under this TENTH Article, which

undertaking may be accepted without reference to the financial ability of such person to make such repayment.

The corporation shall not indemnify any such person seeking indemnification in connection with a proceeding (or part thereof) initiated by such person unless the initiation thereof was approved by the Board of Directors of the corporation.

The indemnification rights provided in this TENTH Article (i) shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any law, agreement or vote of stockholders or disinterested directors or otherwise, and (ii) shall inure to the benefit of the heirs, executors and administrators of such persons. The corporation may, to the extent authorized from time to time by its Board of Directors, grant indemnification rights to other employees or agents of the corporation or other persons serving the corporation and such rights may be equivalent to, or greater or less than, those set forth in this TENTH Article.

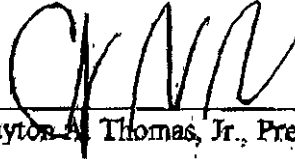
ELEVENTH: The Corporation reserves the right, following the receipt of the necessary approvals of its stockholders, to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute and the Certificate of Incorporation, and all rights conferred upon stockholders herein are granted subject to this reservation.

[signature on following page]

IN WITNESS WHEREOF, Net2000 Group, Inc. has caused this Restated Certificate of Incorporation to be executed in its name and on its behalf by its President on May 19, 1998.

NET2000 GROUP, INC.

By:

  
Clayton A. Thomas, Jr., President